IN THE

Supreme Court of the United States

October Term, 1959

No. 188

SEABOARD SURETY COMPANY,

Petitioner,

vs.

WESTWOOD LAKE, INC., et al.,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit.

REPLY BRIEF OF PETITIONER

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The Respondent, AMERICAN CAST IRON PIPE COMPANY, apparently misconceives the scope of the Petitioner's argument, in its Petition for Certiorari, and the nature of the case stated in the original complaint.

In the original complaint (R. 4) the plaintiff alleged, in paragraph 8, both a joint and a several liability against three defendants, of which AMERICAN CAST IRON PIPE COMPANY was one. The prayer (R. 5) was for a joint and/or several judgment against all three defendants.

The Respondent's brief argues on the assumption that the complaint states a single claim against three defendants severally. The only meaning we can attach to this is that the complaint claims against the defendants only in the alternative. The terms of the complaint show that this simply is not so.

However, the scope of the Petitioner's argument that this court should grant certiorari in this case goes beyond this very narrow question as to what the complaint alleges as to the joint and several liability of the three defendants.

Prior to the adoption of amended Rule 54 (b), there was much discussion in the cases as to when a case involved "jointness" as between defendants and when it involved "distinctness". If it involved "jointness", an order dismissing one of two or more defendants was interlocutory and non-appealable. If it involved "distinctness" between defendants, the order was final and appealable.

The books are full of fine-spun distinctions between the two, a veritable morass of confusing semantics, and as mentioned in our original brief in support of the Petition for Certiorari, much unnecessary judicial manpower was wasted, to say nothing of the labors of the bar and the expense to the litigants. The same will continue to be true, if the decision in this case is allowed to stand.

The amendment to Rule 54 (b) made many judgments interlocutory and non-appealable, which formerly would have been final, when the District Court fails to make the "determination" permitted by the amendment.

6 Moore, pages 218-220

Among the instances cited by the author (footnote 25) is the dismissal of less than all defendants.

At page 245 of the same volume the author says:

"The operational effect of the negative approach of the Rule obviates the necessity to distinguish between "jointness" and "distinctness", and to that extent the former troublesome problem is obviated. To illustrate. Suppose a plaintiff sues two or more defendants; and the district court dismisses the action as to one of the defendants but does not execute its certificate. This adjudication lacks finality. The reasons: (1) if the defendants' liability be regarded as "joint" so that the action contains only one claim so that amended 54 (b) is inapplicable, prior law, nevertheless, holds that the adjudication lacks finality; (2) if the defendant's liability be regarded as "distinct" or "separate" so that the action contains multiple claims, then, since the district court did not execute a certificate, amended 54 (b) makes the adjudication interlocutory, and it is immaterial that the adjudication would formerly have been final.

"Hence in a host of cases, which involved multiple parties, an order terminating the action as to one or more but less than all of the parties, has been held to lack finality where the district court had not executed its certificate."

(Footnotes omitted)

A similar rationale is expressed by Judge Frank, in **Republic of China v. American Express Co.**, 190 F. 2d 334, at page 338.

> "We interpret the Rule (amended 54 (b)) as meaning no more than this: Before the Rule, an order of the kind described therein, even if it would otherwise have been final, was nevertheless interlocutory when the trial judge stated that he was reserving the power to alter it, for then it was but a provisional or tentative order. As, by his explicit reservation, he left the order revocable, he kept it in suspense, and therefore truly interlocutory, hence not appealable. The only effect of Rule 54 (b) is that it requires us to treat the trial judge's silence concerning an order covered by that Rule as the equivalent of such an explicit reservation; in failing to utter a "determination," he is deemed to have made his order subject to his own recall at any time before the end of the entire litigation; . . ."

See also the discussion by Mr. Justice Burton in **Sears, Roebuck & Co. v. Mackey**, 351 U. S. 427, beginning at the bottom of page 433, and continuing to the top of page 436.

In the present case, there is one claim against Westwood Lake, Inc. for wrongfully refusing to pay money claimed to be due the plaintiff. There is another claim against American Cast Iron Pipe Company for what is in effect unjust enrichment at the expense of the plaintiff. That the plaintiff can have but one satisfaction is immaterial. It is likewise immaterial that Westwood Lake, Inc. has been held not liable to the plaintiff be-

cause it paid out money without objection from plaintiff's principal, because even then American Cast Iron Pipe Company may still have been unjustly enriched.

What we most strongly urge upon the Court, however, is that this court state clearly the converse of the rule of the **Mackey** case, that is, that where less than all defendants are dismissed, in a case like this, the order of dismissal is not final and appealable unless the District Court makes its "determination." We believe that the District Courts can be trusted to "dispatch" (to use Mr. Justice Burton's phrase) all proper cases to the appellate courts.

The second point made in respondent's brief is without merit. The plaintiff, and petitioner here, never waived or abondoned its original complaint against American Cast Iron Pipe Company. Instead, it refused to amend, stood on the original complaint and suffered final judgment against it for so doing. The subsequent amendments related solely to the other two defendants.

The only question here involved is **when** that judgment in favor of American Cast Iron Pipe Company became appealable. If this court will settle that question, it will save much judicial manpower, much labor by the bar and much expense to litigants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner was mailed to SAMUEL J. KANNER, 213 Security Trust Building, Miami 32, Florida, attorney for the Respondent, American Cast Iron Pipe Company, and to WILLIAMS & SALOMON, 1003 DuPont Building, Miami, Florida, attorneys for the Respondents, Westwood Lake, Inc. and Mackle Co., Inc., this [illegible] day of August, 1960.

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